

Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO. 99 OF 2021

Niwas Enterprises

...Petitioner

*Versus*

Ravindra Pandurang Ratnaparkhi & Anr.

...Respondents

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Mr. Tapan Thatte i/by Amar Patil for the Petitioner.

Mr. Patil Yogesh Vijay for the Respondents.  
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CORAM : R.I. CHAGLA J

DATE : 25 February 2022

ORDER :

1. Heard learned Counsel for the parties.
2. By this Arbitration Petition, the Petitioner is seeking appointment of Sole Arbitrator to adjudicate the dispute *inter se* between the Applicant and the Respondents.
3. Learned Counsel appearing for the Petitioner has referred to certain clauses in the Development Agreement executed on 2nd July 2019. He has referred to the initial

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clauses after recitals i.e. Clauses 1 to 7. These concern redevelopment of the property by demolishing the existing old structure and to construct the new building/s pursuant to the construction plans to be approved by the concerned authorities, Pune Municipal Corporation. It contemplates allotment of flats to the transferors in the new building and for payment of consideration to the transferors for holding units of alternate accommodation till handing over of the actual, physical and vacant possession of units to the transferors. He has thereafter, referred to the Clause which he considers as the Arbitration Agreement. It is necessary to reproduce Sub-Clause 't' to Clause 23 of the said Development Agreement, which reads as under :-

*“23(t) In case of any dispute or difference of opinion between the parties herein regarding any of the terms and or conditions of these present, the same shall initially be resolved mutually by the parties herein and in case of no such mutual agreement is arrived the parties herein can refer the same to arbitrator.”*

4. He has submitted that by this Clause, the parties

have agreed that they shall initially resolved their disputes mutually and in case no such mutual agreement is arrived at, the parties can refer the same to the arbitrator. He has submitted that this qualifies as an Arbitration Agreement and the parties have consented to refer their disputes before the Arbitrator.

5. Accordingly, the Applicant has invoked Arbitration by the letter dated 21st June 2021. He has submitted that the Respondents have disputed that there is an Arbitration Agreement. Respondents by letter dated 5th July 2021 had stated that they were agreeable for mediation.

6. The Petitioner had appointed one Mr. Anand Lavate as Sole Arbitrator, but this was objected to by the Respondent No. 1, as the Respondents were only agreeable to mutual discussions between the parties. Mr. Anand Lavate, on account of the objection raised by the Respondents that the matter has to be mutually resolved between the parties, discontinued the proceedings. The learned Counsel for the Petitioner has therefore, filed the Petition under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of the Sole

Arbitrator.

7. Learned Counsel appearing for the Respondents has submitted that there is no Arbitration Agreement between the parties. He has submitted that Sub-Clause 't' of Clause 23 of the Development Agreement cannot be read to be an Arbitration Agreement. In that context, he has relied upon the decision of the Supreme Court in case of **Jagdish Chander Vs. Ramesh Chander and Ors.**<sup>1</sup>. He has particularly, relied upon paragraph 8(i) and 8(iv) in that context. He has submitted that the Supreme Court has clearly laid down that while there is no specific form of an Arbitration Agreement, the words used in the Arbitration Agreement should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding Arbitration Agreement.

8. Learned Counsel appearing for the Respondents has further submitted that the said arbitration Clause in the

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<sup>1</sup> (2007) 5 SCC 719

present case, cannot be considered to be an arbitration agreement as it only contemplates the possibility of parties referring the dispute to Arbitration.

9. He has accordingly, submitted that in view of there being no Arbitration Agreement, the Petition requires to be rejected.

10. Having considered the submission of the learned Counsel for the parties, I am of the view that the relevant Sub-Clause 't' of Clause 23 which has been extracted above, does not qualify as an Arbitration Agreement. The clause only contemplates that the parties shall resolve mutually their disputes and only in the case of no such mutual agreement being arrived at, the parties can refer the same to Arbitration. Such a Clause has been considered to be merely a possibility of the parties agreeing to refer to a arbitration in the future.

11. It has been held by the Supreme Court in **Jagdish Chander** (supra), that where there is a mere possibility

of the parties agreeing to arbitration in future, there is no valid and binding arbitration agreement. The terms of the agreement should clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private arbitral tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes. It is only in that case that there is an Arbitration Agreement. Clauses such as these which require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise, is not an Arbitration Agreement. It is only an agreement to enter into an Arbitration Agreement in future.

12.                Thus, in the present case, there is no Arbitration Agreement. In view thereof, the Arbitration Petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 is dismissed.

13.                There shall be no order as to costs.

**[R.I. CHAGLA J.]**